BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BEN CAVENS	)	
Claimant	)	
	)	
VS.	)	
	)	
KREBS FEEDYARD	)	
Respondent	)	Docket No. 1,027,116
	)	
AND	)	
	)	
UNKNOWN	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the May 11, 2005 preliminary hearing Order entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

The Administrative Law Judge (ALJ) concluded that she had no jurisdiction in this claim as the claimant was employed in an agricultural pursuit. Thus, she denied the claimant's request for medical treatment and even went so far to dismiss claimant's claim.

The claimant requests review of this Order alleging the ALJ erred in finding the agricultural exemption barred this claim. Claimant also argues that the ALJ had no authority to dismiss his claim at this juncture.

Respondent argues that the ALJ was correct in applying the agricultural exemption and the subsequent dismissal was equally appropriate.[1]

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[1] The ALJ announced her decision at the Preliminary Hearing but did not memorialize that decision until she issued her written Order on May 7, 2007. That Order was Amended on May 11, 2007, and included an additional statement that claimant's claim was dismissed (at respondent's request). Claimant's Petition for Review was filed May 25, 2007. In its initial response to claimant's appeal, the respondent argued that claimant's appeal of the ALJ's Order was not timely. But in respondent's subsequent brief to the Board this

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

There is no dispute that claimant injured his knee in an accidental injury arising out of and in the course of his employment with respondent in December 2005. He required surgery and now requests additional evaluation and treatment. Respondent has denied claimant's request asserting its business is exempt from the Workers Compensation Act (Act) pursuant to K.S.A. 44-505(a)(1). The Board has jurisdiction to consider this matter as respondent's contention is that there is no jurisdiction under the Act for claimant's injury. This contention is a "certain defense" as that term is used in K.S.A. 44-534a.

The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act. In *Carpenter*,[2] the Court held:

> The term "certain defenses" in K.S.A. 1998 Supp. 44-534a refers to defenses subject to review by the Workers Compensation Board only if they dispute the compensability of the injury under the Workers Compensation Act. (Syllabus 3.)
>
> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.[3]

The underlying facts surrounding this issue are undisputed as well. Corrine Krebs is the sole owner of the Krebs Feedyard, a presumably large facility that, in 2005, was used to feed cattle owned by Ms. Krebs and her son, Dwight, and a brother-in-law. This was an unincorporated business concern that, according to Dwight Krebs, serviced only their family's cattle, turning down requests to feed cattle from other owners and referring them to commercial feedlots in the area. There was one instance in 2006 where, as a courtesy to a neighbor, some non-owned cattle were kept at the feedlot, but the owner was required to pay for his share of the feed.

K.S.A. 44-505(a)(1) provides that the Act shall not apply to:

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argument was apparently abandoned as there was no assertion that the Board had no jurisdiction to address the claimant's appeal.

[2] *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

[3] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

> Agricultural pursuits and employments incident thereto, other than those employments in which the employer is the state, or any department, agency or authority of the state...

The Kansas Court of Appeals adopted a three-part test for determining whether a specific pursuit or business is an agricultural pursuit within the meaning of K.S.A. 1985 Supp. 44-505(a)(1):[4]

> 1. The general nature of the employer's business.
> 2. The traditional meaning of agriculture as the term is commonly understood; and
> 3. Each business will be judged on its own unique characteristics.[5]

In *Witham*, the claimant was injured while holding a horse while a veterinarian took a blood sample. The trial court found the respondent was not engaged in an agricultural pursuit. The Court of Appeals applied the three-part test, finding first that the general nature of respondent's business was boarding and showing other people's horses. Second, the court concluded that the traditional meaning of agriculture would probably not include boarding and showing other people's horses. Moreover, the ordinary farmer typically did not show and board horses. Finally, the court concluded the respondent was primarily engaged in a commercial enterprise which entailed providing services for other people's horses. The court held that the work being done by claimant at the time of his injury was not an agricultural pursuit and the claimant was covered under the Workers Compensation Act.[6]

In a later case, the Court of Appeals held that when the respondent raises the agricultural pursuit defense the court must follow a two-step analysis. First, the Court must determine whether the employer was engaged in an agricultural pursuit using the three-part test set forth in *Witham*. If the answer is "yes," then the Court must proceed to the second step which is to ascertain if the accident occurred while the employee was engaged in an employment incident to the agricultural pursuit. If the answer is "yes," then the employee is not covered by the Act. If the answer is "no," there is coverage.[7]

In *Frost*, the claimant was injured while hooking up a horse trailer to take it to a livestock area on a farm. Claimant was employed as a construction foreman for a

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[4] The statute in effect on claimant's December 2, 2005 accident date was K.S.A. 2000 Furse 44-505(a)(1). This version is the same except for non-substantive word changes.

[5] *Witham v. Parris*, 11 Kan. App. 2d 303, Syl. ¶ 3, 720 P.2d 1125 (1986).

[6] *Id.* at 307.

[7] *Frost v. Builders Service, Inc.*, 13 Kan. App. 2d 5, 11, 760 P.2d 43, *rev. denied* 243 Kan. 778 (1988).

construction company whose primary stockholder was also the owner of the farm where claimant was injured. The court found that it could not be denied that claimant was injured on a farm and was performing work incident to the farming operation at the time of his injury. But the court went on to hold that when the *Witham* test was applied to the facts of the case, claimant was primarily employed by the construction company at the time of his injury and the construction company was not primarily engaged in an agricultural pursuit.

Here, the ALJ concluded that respondent's feedlot was an agricultural pursuit, thus exempt from the requirements of the Act. And as a result, claimant's claim was denied. This member of the Board has reviewed the record and concludes the ALJ's conclusion should be affirmed. The Krebs family used this feedlot to feed their family's cattle. This was not a commercial feedlot and they did not open this facility to others. Although claimant testified that he believed he saw at least 2 or 3 different brands on the cattle housed at the feedlot, that fact does not alter Dwight Krebs' testimony in any meaningful way. Mr. Krebs explained that both he and his mother had cattle at this feedlot as did his brother-in-law. Absent any further evidence, that testimony would explain the different brands on the cattle. And the fact that the feedlot housed a number of cattle from a neighbor's farm for a short period *in 2006* is irrelevant to this dispute. Respondent allowed a neighbor's cattle on the property as a neighborly gesture and there is no evidence that event was done for a commercial purpose. Indeed, the evidence in the record indicates that the owner of that cattle paid for his portion of the feed and it was done on a one-time basis. In any event, this was done *after* claimant's accident. Moreover, claimant was injured while engaged in the respondent's agricultural pursuit.

For these reasons, the Board is persuaded that the ALJ's conclusion that respondent's feedlot is exempt from the Act should and is hereby affirmed.

As for the ALJ's decision to dismiss the claimant's claim, the Board must also consider whether there is jurisdiction to review that decision. Although the pending dispute was brought before the ALJ pursuant to the preliminary hearing statute, respondent also specifically requested a dismissal from this claim based upon its contention that the Act does not apply. Although claimant sought, but was denied preliminary hearing benefits, the ALJ's decision to dismiss the claim essentially terminates these proceedings.

K.S.A. 2005 Supp. 44-551(b)(1) grants the Board jurisdiction to review -

> All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days.

The limitation to "final" orders was not in the original 1993 version of K.S.A. 44-551. That term was added in 1997 after the Kansas Court of Appeals ruled that the Board's jurisdiction included the right to review such orders as an appointment of a neutral

physician and held that the Board's jurisdiction was not limited to review of final orders or awards.[8] The term "final" is, of course, defined as it relates to review by the Kansas Court of Appeals and this is a logical source for a definition.

Generally, a decision or order is final only when it resolves all issues between the parties and reserves no further question for future action. But the Kansas Court of Appeals has also recognized an exception to this general rule in certain cases where there is no other effective means to review the decision. In *Skahan*[9] the Court of Appeals has enunciated three criteria which also make an order a final order. The order may be final even if it does not resolve all issues between the parties if the order (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment.

In the Board's view the current Order satisfies the *Skahan* criteria. This decision forecloses claimant's opportunity to seek a full hearing on the issue of the agricultural exemption. And while there has been ample time for the claimant to develop this evidence since his accident and further discovery may not alter the ultimate legal conclusion, the Board finds it inappropriate to dismiss this claim at this juncture of the proceedings, short of a full hearing, effectively foreclosing any further opportunity for claimant to establish a jurisdictional basis for his claim. Accordingly, the ALJ's decision to dismiss claimant's claim is reversed and set aside. And this matter is referred to the ALJ for further proceedings, if requested.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[10] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Pamela J. Fuller dated May 11, 2005, is affirmed in part and reversed in part.

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[8] *Winters v. GNB Battery Technologies*, 23 Kan. App. 2d 92, 927 P.2d 512 (1996).

[9] *Skahan v. Powell*, 8 Kan. App. 2d 204, 653 P.2d 1192 (1982).

[10] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of July, 2007.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Robert A. Levy, Attorney for Claimant
Jake Brooks, Attorney for Respondent
Terry J. Torline, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge